

ORIGINAL

NO. 83-6043

Supreme Court, U.S.
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ALEXANDER L. STEVENS
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

GREGORY SCOTT ENGLE,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

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REPLY BRIEF ON
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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QUESTION

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TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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QUESTION II

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The state, at page 1 of its response, says "The Supreme Court of Florida did not reach the issue of whether the judicial rejection of the jury recommendation satisfied the requirements of Tedder v. State, 322 So.2d 908 (Fla. 1975)," and contends that that Court "never even intimated whether the rejection of the jury recommendation could or would be sustained under Tedder" While petitioner certainly would agree that the Florida Supreme Court need not have ruled on the validity of the trial court's override of the jury's life recommendation, the fact remains that it chose to do so. The opinion reads, in part:

Appellant's sixth point on appeal is that the trial court erred by rejecting the jury's recommendation of life imprisonment and instead imposing the death penalty. We note at the outset the error of appellant's contention that a sentence of death imposed by a trial court after a jury recommendation of life imprisonment constitutes double jeopardy. We held to the contrary in Douglas v. State, 373 So.2d 895 (Fla. 1979). See also Phippen v. State, 389 So.2d 991 (Fla. 1980).

As to the propriety of the judge's failure to follow the jury's sentence recommendation, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial judge found four aggravating circumstances, to wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed to avoid a lawful arrest, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings.

Engle v. State, 438 So.2d 803,812 (Fla. 1983)

On the merits of petitioner's argument that Florida's

statutory procedure authorizing the trial judge to impose a death sentence notwithstanding the jury's life recommendation is unconstitutional as applied, the state blithely responds that that the issue is foreclosed by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Petitioner relies on the arguments made in his petition for certiorari to show why this is not so; in addition, petitioner would note that on January 9, 1984, this Court granted certiorari in Spaziano v. Florida, __ U.S. __ (1984)(Case No. 83-5596)(34 Cr.L. 4159). Three questions are presented in Spaziano; two of these are whether the Florida Supreme Court, in affirming death sentences, has adopted such broad and vague application of standards governing the decision to override a jury's life verdict as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments; and whether the trial judge's override of a jury's factually based decision against imposition of the death penalty violates, in all cases, the Fifth, Sixth, and Fourteenth Amendments. Accordingly, in view of the similarity of the issues in Spaziano and the instant case, petitioner respectfully requests that this Court accept this case for review in conjunction with Spaziano, or, in the alternative, to stay its disposition of this petition for certiorari until Spaziano has been decided.

Finally, petitioner would note that in the past two weeks the Florida Supreme Court has affirmed two more death sentences which were imposed notwithstanding jury life recommendations. Lusk v. State, __ So.2d __ (Fla. 1984)(Case No. 59,146, opinion filed January 26, 1984); Heiney v. State, __ So.2d __ (Fla. 1984)(Case No. 56,778, opinion filed February 2, 1984). This brings the total to 21 death sentences which have been affirmed by the Florida Supreme Court following the trial court's override of the jury's life recommendation.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E., Washington, DC 20543; Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and copies furnished by hand delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 7 day of February, 1984.

Steven L. Bolotin
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